(6)

No. 04-702

In the Supreme Court of the United States

SALIM AHMED HAMDAN, PETITIONER

v.

DONALD H. RUMSFELD, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district erred in refusing to abstain from interfering with ongoing military commission proceedings instead of awaiting their outcome.

2. Whether the district court erred in holding that petitioner has judicially enforceable rights under the current Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316.

3. Whether the district court erred in overruling the President's determination as Commander in Chief that al Qaeda combatants are not protected by the Geneva Convention.

4. Whether the district court erred in holding that petitioner has a colorable claim of prisoner-of-war status under the Geneva Convention.

5. Whether the district court erred in holding that the federal regulations governing military commissions must conform to the provisions in the Uniform Code of Military Justice (10 U.S.C. 801 *et seq.*) applicable to courts-martial.

6. Whether the President has inherent power to establish military commissions.

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OPINION BELOW

The opinion of the district court (Pet. App. 1-31) is not yet reported, but it is available at 2004 WL 2504508.

JURISDICTION

The judgment of the district court was entered on November 8, 2004. The notice of appeal was filed on November 16, 2004. Pet. App. 46-47. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

STATEMENT

Petitioner is an enemy combatant who has been charged with an offense against the laws of war. Pet. App. 40-45. The legality of his trial before a military commission is currently before the United States Court of Appeals for the District of Columbia Circuit, which is

considering on an expedited basis the government's appeal from the district court order. *Id.* at 56-57. Petitioner nonetheless seeks to short-circuit that process of orderly review by asking this Court to grant certiorari before judgment. Because that request is without merit, the petition should be denied.

1. On September 11, 2001, the United States endured a foreign enemy attack more savage, deadly, and destructive than any sustained by the Nation on any one day in its history. That morning, agents of the al Qaeda terrorist network hijacked four commercial airliners and crashed them into targets in the Nation's financial center and its seat of government. The attacks killed approximately 3000 persons and caused injury to thousands more persons, destroyed billions of dollars in property, and exacted a heavy toll on the Nation's infrastructure and economy.

The President took immediate action to defend the country and prevent additional attacks. Congress swiftly enacted its support of the President's use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224.

The President ordered the armed forces of the United States to subdue the al Qaeda terrorist network, as well as the Taliban regime in Afghanistan that supported it. In the course of those armed conflicts, the United States, consistent with the Nation's settled practice in times of war, has seized numerous persons fighting for the enemy and detained them as enemy combatants. Equally consistent with historical practice, the President ordered the establishment of military

commissions to try members of al Qaeda and others involved in international terrorism against the United States for violations of the laws of war and other applicable laws. In doing so, the President expressly relied on "the authority vested in me * * * as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] * * * and sections 821 and 836 of title 10, United States Code."[1] *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (2001) (Military Order).

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[1] Section 821 of title 10, United States Code, provides in relevant part:

> **Art. 21. Jurisdiction of courts-martial not exclusive**
>
> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions * * * of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions[.]

10 U.S.C. 821.

Section 836 of title 10, United States Code, provides in relevant part:

> **Art. 36. President may prescribe rules**
>
> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, * * * may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

2. In July 2003, the President, acting pursuant to the Military Order, designated petitioner for trial before a military commission, finding "that there is reason to believe that [Hamdan] was a member of al Qaeda or was otherwise involved in terrorism directed against the United States." Pet. App. 2. Petitioner was charged with a conspiracy to commit attacks on civilians and civilian objects, murder and destruction of property by an unprivileged belligerent, and terrorism. *Id.* at 41-45.

The Charge against petitioner arises out of his close connection to Osama bin Laden and his participation in al Qaeda's campaign of international terrorism against the United States. Pet. App. 43-45. The Charge alleges that petitioner served as bin Laden's bodyguard and personal driver. In that capacity, he delivered weapons and ammunition to al Qaeda members and associates; transported weapons from Taliban warehouses to the head of al Qaeda's security committee at Qandahar, Afghanistan; purchased or otherwise secured trucks for bin Laden's bodyguard detail; and drove bin Laden and other high-ranking al Qaeda operatives in convoys with armed bodyguards. *Ibid.*

The Charge also alleges that petitioner was aware during this period that bin Laden and his associates had participated in terrorist attacks against U.S. citizens and property, including the September 11 attacks. Pet. App. 43. According to the Charge, petitioner received terrorist training himself, learning to use machine guns, rifles, and handguns at an al Qaeda training camp in Afghanistan. *Id.* at 45.

The military commission proceedings at Guantanamo accord petitioner numerous procedural protections. He has legal counsel appointed to represent him. 32 C.F.R. 9.4(c)(2). Petitioner has the right to a copy of the

Charge in a language he understands, 32 C.F.R. 9.5(a), the presumption of innocence, 32 C.F.R. 9.5(b), and proof beyond a reasonable doubt, 32 C.F.R. 9.5(c). He may confront witnesses against him, 32 C.F.R. 9.5(i), and subpoena his own witnesses, if reasonably available, 32 C.F.R. 9.5(h). Petitioner will have access to all evidence, except classified and other national security material, which must be provided to his counsel before being admitted against him. 32 C.F.R. 9.5(e), 9.6(d)(5), 9.9. If petitioner is found guilty by the commission, that judgment will be reviewed by a review panel, the Secretary of Defense, and ultimately the President, if he does not designate the Secretary as the final decisionmaker. 32 C.F.R. 9.6(h).[2]

While at Guantanamo, petitioner has also been given a hearing before a Combatant Status Review Tribunal, which confirmed that he is an enemy combatant who is "either a member of or affiliated with Al Qaeda," subject to continued detention. Pet. App. 12; C.A. App. 249; see *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633, 2340-2343 (2004) (plurality opinion) (concluding that Congress has authorized the detention of enemy combatants, including United States citizens, by enacting the AUMF); *id.* at 2678-2679 (Thomas, J. dissenting).

3. Petitioner's counsel instituted these proceedings by filing a petition for habeas corpus and/or mandamus

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[2] Before the district court enjoined the commission proceedings, the Appointing Authority for Military Commissions, see 32 C.F.R. 9.2, issued a decision granting in part petitioner's motion to remove several of the commission members on the ground that there was reason to doubt whether those members could be impartial. The Appointing Authority's lengthy opinion referenced standards applied in both federal courts and international courts in concluding that three members of the commission had to be removed. See <www.defenselink.mil/news/Oct2004/d20041021panel.pdf>.

in the United States District Court for the Western District of Washington, alleging in relevant part that trial before a military commission rather than a court-martial convened under the Uniform Code of Military Justice (UCMJ) (10 U.S.C. 801 *et seq.*) would be unconstitutional and a violation of the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 (the Geneva Convention). See C.A. App. 38-68. While petitioner acknowledged that he worked for bin Laden for many years prior to his capture, see *id.* at 50-51 (paras. 15-16), he asserted that he was unaware of bin Laden's terrorist activities, *id.* at 52 (para. 19). The district court transferred the case to the United States District Court for the District of Columbia. *Id.* at 195.

4. The transferee district court granted the petition in part, holding that petitioner could not be tried before a military commission. Pet. App. 30-31. The court first declined to abstain from interfering with the pending military commission, which was in the midst of a hearing to consider the very claims that petitioner raises in his federal-court petition, *id.* at 55, and was a month away from the scheduled trial date, see C.A. App. 250. The court instead held that abstention was "neither required nor appropriate" because petitioner challenged the jurisdiction of the commission over him. See Pet. App. 4-6.

Next, the district court ruled that the military commission lacked jurisdiction over petitioner because a "competent tribunal" had yet to determine whether he was entitled to prisoner-of-war (POW) status under the Geneva Convention, a status that the court believed would preclude his trial by military commission. See Pet. App. 6-17. In so holding, the district court determined that the Convention grants petitioner rights

enforceable in federal court and overruled the President's determination that al Qaeda combatants are not protected by the Convention. *Id.* at 13, 15-17.

The district court further held that, even if a "competent tribunal" determines that petitioner is an unlawful enemy combatant rather than a POW, he can be tried by a military commission only if the commission rules are amended so that they are consistent with Article 39 of the UCMJ, 10 U.S.C. 839, which governs the presence of the accused at a court-martial. Pet. App. 18-30.

Based on those legal rulings, the court took the extraordinary and unprecedented step of enjoining the ongoing military commission proceedings and ordered petitioner released to the general detention population at Guantanamo Bay Naval Base. Pet. App. 30-31.

5. On November 16, 2004, the government filed a notice of appeal from the district court's order. Pet. App. 46-47. Thereafter, the government moved for expedited consideration of the appeal. *Id.* at 48-54. Petitioner refused to consent to expedition and reserved the right to oppose it. *Id.* at 53. On November 17, the D.C. Circuit granted the motion to expedite without calling for a response. *Id.* at 56-57. Under the court's highly expedited schedule, respondents filed their opening brief on December 8, 2004, and briefing will be complete by January 10, 2005. *Ibid.* Oral argument is scheduled for March 8, 2005, before Judges Randolph, Roberts, and Williams.

ARGUMENT

Petitioner (Pet. 4-25) seeks the extraordinary remedy of certiorari before judgment despite having prevailed in the district court and having received interim injunctive relief. This Court's Rules make clear that

such an extraordinary petition will not be granted unless it meets the stringent criteria for this Court's immediate intervention. See Sup. Ct. R. 11 (such petition "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court"). Those criteria are not remotely satisfied here, because petitioner is unable to show irreparable harm of a nature that would warrant immediate review, the court of appeals has agreed to expedite review, the legal issues would benefit from consideration by the court of appeals, and that consideration could foreclose the need for this Court's intervention. Accordingly, his petition for certiorari before judgment should be denied.

1. a. Petitioner contends (Pet. 5) that he is "entitled to an expeditious resolution of his claims," because he has been imprisoned at Guantanamo Bay for three years. That is a legal non sequitur. The legal claims advanced in his federal-court petition do not directly address the validity of his detention as an enemy combatant, but rather challenge his trial by military commission. See C.A. App. 56-64; Pet. App. 30 n.25.

Petitioner is an alien with no ties to the United States who is being detained by the U.S. military as an al Qaeda combatant and whose status as such was confirmed by a Combatant Status Review Tribunal. Petitioner therefore is subject to continued detention as an enemy combatant regardless of the outcome of his legal challenge to his trial by military commission, whose resolution could provide no basis for his release from confinement. See *Hamdi*, 124 S. Ct. at 2643 (plurality opinion) (concluding that Congress through the AUMF has authorized the detention of American citizens who are determined to be enemy combatants,

whether that determination is the product of "concession or * * * some other process that verifies this fact with sufficient certainty"); *id.* at 2678-2679 (Thomas, J. dissenting). The district court recognized as much, see Pet. App. 29-30 (citing *Hamdi* and noting that petitioner "may be detained for the duration of the hostilities in Afghanistan if he has been appropriately determined to be an enemy combatant"), but nevertheless granted petitioner extraordinary and interlocutory injunctive relief affecting the location, not the fact, of his confinement.[3] As explained further below, pp. 16-17, granting such relief in these circumstances rather than awaiting the outcome of the military proceedings was erroneous, but that error is a basis on which the D.C. Circuit should reverse the district court and allow the commission proceedings to resume; it is decidedly not a basis for petitioner—the beneficiary of the district court's ruling—to obtain certiorari before judgment.

b. In addition to relying upon his continued detention, petitioner cites (Pet. 12-13) the harms caused by the district court's ruling discussed in the government's motion to expedite the appeal before the D.C. Circuit (Pet. App. 48-54). While it is certainly true that the district court's erroneous rulings "represent an unprecedented judicial intrusion into the prerogatives of the President," *id.* at 50, respondents are in the best

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[3] Based on its holding that petitioner could not be tried by military commission, the district court ordered that petitioner be confined at Camp Delta with the general detention population at Guantanamo, rather than with the pre-Commission detainees in another part of Camp Delta. Pet. App. 31. The government did not seek a stay of that order pending appeal, but instead complied with the injunction pending an expedited appeal. As a result, intervention by this Court at this time could have no possible impact on the location of petitioner's confinement.

position to determine the proper response to that intrusion, including whether to seek a stay, expedited review in the court of appeals, or immediate review by this Court. In this case, respondents determined that the most appropriate avenue to pursue was expedited appellate review in the D.C. Circuit. That course of action offers distinct advantages to this Court.

First, although the legitimacy of military commissions in the scheme of military justice is well established by decisions of this Court, see *Ex parte Quirin*, 317 U.S. 1 (1942) (upholding trial by military commission of Nazi saboteurs, including presumed American citizen); *Yamashita* v. *Styer*, 327 U.S. 1 (1946) (upholding trial by military commission of Japanese military governor of the Phillippines); *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950) (upholding trial by military commission of German nationals who allegedly worked for civilian agencies of the German government in China); *Madsen* v. *Kinsella*, 343 U.S. 341 (1952) (upholding trial by military commission of the spouse of a serviceman posted in occupied Germany), the district court's side-stepping of this Court's decision in *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975) (refusing to consider jurisdictional challenge to court-martial before military proceedings are completed), its interpretation of the Geneva Convention, and its construction of the UCMJ are all novel. This Court would thus benefit from review by the court of appeals, which could provide helpful guidance on all of those issues.[4]

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[4] The lack of *any* previous appellate consideration of the questions presented in this case distinguishes it from cases in which this Court has granted certiorari before judgment in the face of conflicting decisions by other courts. See, *e.g.*, *United States* v. *Fanfan*, No. 04-105 (granting certiorari before judgment where courts of appeals were already in conflict regarding jury trial

Second, and more important, consideration of the appeal by the D.C. Circuit could not only provide helpful guidance, but could also entirely obviate the need for this Court's review at this interlocutory stage. For example, if the court of appeals were to reverse the district court and permit the military commission proceedings to go forward under *Councilman*, this Court could await the outcome of the military proceedings and the resolution by the lower courts of any collateral challenge to that outcome before exercising review. If petitioner is acquitted before the commission, the Court can avoid these sensitive issues altogether. That approach would conserve judicial resources and avoid the unnecessary resolution of some or all of petitioner's claims.

It is precisely such concerns about judicial economy that have contributed to this Court's traditional reluctance to consider legal claims that are presented in an interlocutory posture. See *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (interlocutory status of the case "of itself alone furnishe[s] sufficient ground for the denial" of the petition); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring). Indeed, this Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of criminal proceedings. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002). The practice of deferring review

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rights in federal sentencing proceedings); *Dames & Moore* v. *Regan*, 453 U.S. 654, 667-668 (1981) (granting certiorari before judgment where district court had enjoined the transfer of Iranian assets subject to a judicial lien, but the courts of appeals for the First Circuit and the D.C. Circuit had upheld the President's authority to require such a transfer).

until final judgment in criminal cases promotes judicial efficiency by avoiding the resolution of legal issues that could be mooted by an acquittal and by ensuring that, if the defendant is convicted and his conviction and sentence are affirmed on appeal, all of the defendant's claims—or at least those that the defendant concludes are most meritorious—will be consolidated and presented in a single petition to this Court.

The rationale behind this Court's general practice in criminal cases applies to the circumstances presented here. Indeed, this Court's reluctance to intervene when a case is in an interlocutory posture should be especially pronounced in the circumstances of this case, where petitioner has sought certiorari before judgment and where the legal issues would require the Court to make possibly unnecessary determinations affecting the exercise of the President's core Commander-in-Chief and foreign affairs authority.

Concerns about unnecessary judicial interference with military affairs underlie the abstention doctrine of *Councilman*. The concern for interference with military exigencies is only heightened here, where the military proceedings involve enforcement of the laws of war in the midst of an ongoing armed conflict against an enemy force that is targeting civilians for mass death. See *Yamashita*, 327 U.S. at 11 ("trial and punishment of enemy combatants" for war crimes is "part of the conduct of war operating as a preventive measure against such violations"); *Hirota* v. *MacArthur*, 338 U.S. 197, 208 (1948) (Douglas, J., concurring) ("punishment of war criminals * * * dilut[es] * * * enemy power and involv[es] retribution for wrongs done").

These considerations render especially misplaced petitioner's reliance (Pet. 6-11) on cases in which the *government* has sought or acceded to a request for

certiorari before judgment. See, *e.g.*, *Wilson* v. *Gerard*, 354 U.S. 524, 526 (1957) (per curiam); *Reid* v. *Covert*, 351 U.S. 487 (1956); *Kinsella* v. *Krueger*, 351 U.S. 470, 473 (1956); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 937 (1952) (per curiam); *United States* v. *United Mine Workers*, 330 U.S. 258, 269 (1947); *United States* v. *Bankers Trust Co.*, 294 U.S. 240, 294-295 (1935). The Executive, unlike a private litigant, has the responsibility to oversee this Nation's foreign relations and its fighting of an overseas war. The Executive is, therefore, uniquely positioned to determine whether a district court decision affecting the war requires this Court's immediate intervention. Here, the Executive has determined that, despite the district court's unprecedented interference with military commission proceedings, expedited review by the court of appeals will suffice to allow the government the opportunity to correct the erroneous decision in a time frame that will not compromise its interests.

c. Petitioner further argues (Pet. 7-8) that this case presents the same justification for certiorari before judgment as *Quirin*. He is wrong for several reasons. First, the petitioners there, who included a presumed U.S. citizen, faced imminent execution, which is not the case here. Because petitioner faces a maximum sentence of life imprisonment, this Court can rest assured that it will have an opportunity to review petitioner's claims at the appropriate time in the event an adverse final judgment is entered against him.

Second, at the time the *Quirin* Court decided to review the claims of the sabotuers, whose request for relief had been *denied* by the district court, the permissibility of subjecting citizens detained in the United States to military commissions was uncertain. Indeed, the most apposite precedent at the time was *Ex parte*

Milligan, 71 U.S. (4 Wall.) 2 (1866), which had held that the U.S. military lacked authority to subject to trial by military commission an American citizen who was alleged to have "conspired with bad men" (*id.* at 131) against the United States during the Civil War. This case involves an alien enemy combatant captured abroad, a context in which the jurisdiction of military commissions has long been clear. Moreover, the legal landscape has changed considerably since the summer of 1942, because the *Quirin* decision itself, recently reaffirmed in *Hamdi*, 124 S. Ct. at 2643 (plurality opinion); *id.* at 2682 (Thomas, J, dissenting), as well as *Yamashita* and *Eisentrager*, make clear that military commissions in a variety of circumstances may try enemy combatants for offenses against the laws of war.[5] Finally, the rule that federal courts generally should not inject themselves into military proceedings before they have run their course had not been firmly established when *Quirin* was decided. Indeed, *Councilman* came more than thirty years later. That rule of absten-

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[5] Petitioner mistakenly claims (Pet. 15) that "the Uniform Code of Military Justice * * * has completely revolutionized the predecessor Articles of War," which the *Quirin* Court construed to constitute congressional authorization to the President to convene military commissions. See 317 U.S. at 28-29. The provisions of the UCMJ on which the President expressly relied in his Military Order, Articles 21 and 36, are identical in all material respects to their precursor provisions in the Articles of War. If the plain language of the UCMJ provisions were not enough, the Committee Reports accompanying their enactment state that the codification at Article 21 of the UCMJ, 10 U.S.C. 821, of Article 15 of the Articles of War was designed to preserve *Quirin*'s construction of Article 15. See S. Rep. No. 486, 81st Cong., 1st Sess. 13 (1949); H.R. Rep. No. 491, 81st Cong., 1st Sess. 17 (1949). But, of course, the effect of the UCMJ is just one more issue that would benefit from further consideration by the court of appeals.

tion counsels in favor of this Court exercising restraint in the face of petitioner's extraordinary request.

d. Petitioner also cites (Pet. 23) the need for guidance in other pending cases as supporting review before judgment. But that consideration counsels against immediate review. In the first place, because all related litigation is currently pending within the District of Columbia, the court of appeals may be able to provide uniform guidance without the need for this Court's intervention. In addition, whether or not this Court ultimately intervenes, both the D.C. Circuit and this Court would benefit from additional consideration of the relevant issues. Some of the issues presented in the petition—including the potentially dispositive *Councilman* issue—will be of little relevance to most of the other pending cases. Other issues may be of greater relevance, but additional guidance may be provided by the district court judges before whom dispositive motions have been fully briefed and ultimately by the D.C. Circuit. Just six months ago, this Court opted to leave questions about "[w]hether and what further proceedings may become necessary" in addressing claims of Guantanamo detainees, *Rasul* v. *Bush*, 124 S. Ct. 2686, 2699 (2004), and the "permissible bounds of the category" of enemy combatants to "the lower courts as subsequent cases are presented to them," *Hamdi*, 124 S. Ct. at 2642 n.1. Depending on the lower courts' resolution of those issues, the Court's intervention may be warranted, but there is no cause for pretermitting that process before it begins.

2. Given the impropriety of premature and possibly unnecessary resolution by this Court of the underlying issues in this case, a point-by-point rebuttal of petitioner's lengthy arguments on the merits for affirmance of the district court's holding is unwarranted. See Pet.

16-25. Respondents nevertheless will address the merits briefly to demonstrate the substantial nature of the arguments for reversal by the court of appeals. These same arguments are, of course, currently before the court of appeals for consideration, and indeed will be fully briefed before this petition comes before the Conference. The issues should be left for that court's resolution in the first instance.

a. The district court erred in failing to abstain. As this Court has instructed, courts should not entertain an attack on ongoing military proceedings even if the challenge is framed in jurisdictional terms. *Councilman*, 420 U.S. at 741-742, 758-759. The limited exception for challenges brought by U.S. *civilians* subjected to military proceedings, see *Reid* v. *Covert*, 354 U.S. 1 (1957) (plurality opinion); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955), plainly does not apply to petitioner, an alien whom the government has classified as an enemy combatant and seeks to hold accountable for specific war crimes. Moreover, the premise for *Reid* and *Toth* was the constitutional liberty interest that a U.S. citizen civilian enjoys. See *Councilman*, 420 U.S. at 759. In light of petitioner's status as a confirmed enemy combatant subject to continuing military jurisdiction, and as an alien with no voluntary ties to the United States, the rationale for intervention in *Reid* and *Toth* is non-existent here. See *Councilman*, 420 U.S. at 759 (distinguishing *Reid* and *Toth* on the ground that Councilman was unquestionably "subject to military authority"); *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 270 (1990) (holding that a nonresident alien "can derive no comfort" from the *Reid* line of cases involving U.S. citizens). For this reason, the government has urged the court of appeals to vacate the district court's injunction and to stay or dismiss peti-

tioner's claims until the military commission proceedings have run their course. If the court of appeals does so, the military commission proceedings should be permitted to resume without further delay.

b. The district court also ruled that trial by military commission would violate petitioner's rights under Article 102 of the Geneva Convention, 6 U.S.T. at 3394, which provides that "[a] prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power." The district court reasoned that, in the absence of a determination under Article 5 of the Geneva Convention[6] that petitioner is not a POW under Article 4,[7] he may be tried only by court-martial. In so

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[6] That provision provides:

> The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.
>
> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Article 5, 6 U.S.T. at 3322.

[7] That provision provides in relevant part:

> A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:
>
> 2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, * * * provided that such militias or vol-

ruling, the district court made several independent legal errors.

First, the district court erred in holding that the Geneva Convention provides rights enforceable by individuals in the courts of the United States. In *Eisentrager*, this Court concluded that the 1929 Geneva Convention, the predecessor to the 1949 Convention, did not confer rights enforceable in our domestic, civilian courts, but was a matter for state-to-state relations. 339 U.S. at 789 n.14. There is no indication in the 1949 Convention's text or drafting and ratification history to suggest the revolutionary intent to create judicially enforceable rights—which would, by permitting captured enemies to continue their fight in our Nation's courts, threaten to undermine the President's power to subdue the enemy.

The district court erroneously held that this extraordinary result was compelled by Article 21 of the UCMJ, 10 U.S.C. 821, the very provision that Congress codified to preserve the result in *Quirin*. See note 5, *supra*. Article 21 preserves the historical jurisdiction of military commissions over offenses against the laws of war, in the face of the extension of court-martial

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unteer corps, including such organized resistance movements, fulfil the following conditions:

(a) That of being commanded by a person responsible for his subordinates;

(b) That of having a fixed distinctive sign recognizable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.

Article 4A(2), 6 U.S.T. at 3320.

jurisdiction effected by the UCMJ. Article 21 does not limit the President's authority under the Constitution to subject alleged war criminals to trial by military commission, let alone provide a backdoor mechanism for judicial enforcement of the Geneva Convention at the behest of enemy aliens.

The district court compounded its error by holding the Convention specifically enforceable by petitioner, a confirmed al Qaeda operative. The President's contrary determination that the Geneva Convention does not extend to al Qaeda operatives, see Addendum to Gov't C.A. Br. 11a-12a, is an exercise of his Commander-in-Chief and foreign-affairs powers not subject to countermand by the courts. It is, furthermore, plainly correct. The Convention, by its terms, applies to cases of "armed conflict which may arise between two or more of the High Contracting Parties." Art. 2, 6 U.S.T. at 3318. Al Qaeda is not a "High Contracting Party," because it has not signed the Convention (nor could it do so, since it obviously is not a State).

Even assuming that the Convention applied to al Qaeda and was judicially enforceable by captured enemy fighters, the district court further erred in holding that petitioner had raised a colorable claim of POW status. Al Qaeda does not meet any of the requirements set out in Article 4 of the Convention, such as wearing a distinctive sign and conducting operations "in accordance with the laws and customs of war." Indeed, petitioner has never even asserted that he is part of a group entitled to lawful belligerent status, yet that is the very claim the district court held must be resolved against petitioner before the military commission can

exercise jurisdiction.[8] Instead, petitioner has claimed to be an innocent civilian. To the extent this claim ever raised a relevant "doubt" as to petitioner's POW status under Article 5 of the Geneva Convention, see note 6, *supra*, it has already been rejected by a "competent tribunal"—petitioner's Combatant Status Review Tribunal—which confirmed that petitioner is an al Qaeda operative. There is no need for another tribunal (other than the military commission itself) to consider that claim.

c. Finally, the district court erred in holding that, even if another competent tribunal is convened and determines that petitioner is not a POW and thus may be tried by military commission, petitioner nonetheless must be provided the functional equivalent of a court-martial under Article 36 of the UCMJ. That Article, under which the rules the President prescribes for military commissions "may not be contrary to or inconsistent with" the UCMJ, 10 U.S.C. 836(a), does not require that military commissions comply with the rules that the UCMJ has made applicable to courts-martial only. To the contrary, Congress has never sought to regulate military commissions comprehensively. Rather, it has recognized and approved the President's historic use of military commissions as he deems necessary to prosecute offenders against the

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[8] Other courts have recognized that an al Qaeda operative's claim to lawful belligerent status would be frivolous. See *United States* v. *Lindh*, 212 F. Supp. 2d 541, 552 n.16 (E.D. Va. 2002) ("[T]here is no plausible claim of lawful combatant immunity in connection with al Qaeda membership."); *Padilla ex rel. Newman* v. *Bush*, 233 F. Supp. 2d 564, 593 (S.D.N.Y. 2002) (deeming it "obvious" that al Qaeda operatives are unlawful combatants), rev'd on other grounds *sub nom. Padilla* v. *Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), rev'd for lack of jurisdiction, 124 S. Ct. 2711 (2004).

laws of war. See *Madsen*, 343 U.S. at 347 ("Neither their procedure nor their jurisdiction has been prescribed by statute."). If military commissions must follow the same procedures as courts-martial, there is no point in having a military commission, whose jurisdiction the UCMJ recognizes precisely because of the historic authority and flexibility the President has had to administer justice to enemy fighters who commit offenses against the laws of war. Indeed, the district court's reading of Article 36 creates grave doubts about its constitutionality, because that reading frustrates the exercise of the President's war powers.

Even this brief review of the issues before the court of appeals underscores the benefits of allowing the ordinary appellate process to take its course. All of these issues will be fully briefed before the Court considers this petition. The court of appeals could resolve the government's expedited appeal on any number of grounds, most of which would simplify and streamline the issues, and many of which would obviate any need for this Court's review. But no matter how the court of appeals resolves this case, it will provide additional guidance on sensitive issues that implicate important considerations of national security and the separation of powers. Consideration by the lower courts streamlined the litigation and sharpened the issues in *Hamdi*, *Rasul*, and *Rumsfeld* v. *Padilla*, 124 S. Ct. 2711 (2004). There is no need to follow a different course here and grant review based on the mistaken analysis of a single district court.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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